SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 3

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SONIA GLUCKMAN, WARREN R. GRODIN, MANDEL AIRPLANE FUNDING AND LEASING, INC. d/b/a MANDEL AIRPLANE FUND AND LEASING, INC. AND SUSAN STEIGER,

Plaintiffs,

-against-

LASERLINE-VULCAN ENERGY LEASING, LLC, LASERLINE LEASE FINANCE CORP., W. MARK EDDINGTON, FORD F. GRAHAM, VULCAN ENERGY, LLC, VULCAN POWER LEASING, LLC, VULCAN AMPS, LLC, VULCAN ADVANCED MOBILE POWER SYSTEMS, LLC, VULCAN ENERGY SOLUTIONS, LLC, VULCAN CAPITAL MANAGEMENT, INC., KEVIN DAVIS, "JOHN DOE," and RICHARD ROE,

Defendants.

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Index No.: 601687/08
Motion Date: 6/29/09
Mtn. Seq. Nos.: 002, 003, 004

PRESENT: EILEEN BRANSTEN, J.:

This action concerns a single loan transaction between plaintiffs Sonia Gluckman, Warren R. Grodin, Mandel Airplane Funding and Leasing, Inc., and Susan Steiger and defendant Laserline-Vulcan Energy Leasing, LLC ("LVEL"). Plaintiffs each claim to have loaned money to LVEL to provide part of the funding needed to construct a mobile power generator known as a VAMPS Unit, which, upon completion, was to be sold for a considerable profit. However, the VAMPS Unit was never constructed, and LVEL never repaid plaintiffs. Plaintiffs now attempt to recover their loans, not only from LVEL, with whom plaintiffs invested their money, but also from multiple corporations and individuals

who were not parties to plaintiffs' loan transaction. Notwithstanding the fact that this action is principally a breach of contract action, plaintiffs also assert tort-based claims sounding in fraud, conversion, intentional interference with contractual relations and breach of fiduciary duty, as well as various other causes of action.

Motion Sequence Nos. 002, 003 and 004 are consolidated for disposition. In Motion Sequence No. 002, plaintiffs move to disqualify the law firm of Gersten Savage LLP from simultaneously representing defendants W. Mark Eddington, Laserline Lease Finance Corp. ("Laserline") and LVEL (collectively, the "Laserline defendants").

In Motion Sequence No. 003, the Laserline defendants move, pursuant to CPLR 3211 (a) (7), to dismiss the first amended complaint for failure to state a cause of action. Plaintiffs cross-move for leave to amend the first amended complaint.

In Motion Sequence No. 004, defendants Vulcan Energy, LLC ("Vulcan Energy"), Vulcan Power Leasing, LLC, Vulcan AMPS, LLC ("Vulcan AMPS"), Vulcan Advanced Mobile Power Systems, LLC, Vulcan Energy Solutions, LLC, Vulcan Capital Management, Inc., Ford F. Graham and Kevin Davis (collectively, the "Vulcan defendants") also move, pursuant to CPLR 3211 (a) (7), to dismiss the first amended complaint.

BACKGROUND

LVEL is a limited liability company formed for the purpose of selling and leasing mobile power systems like the VAMPS Unit (Amended Complaint at ¶¶ 19, 29). LVEL consists of two corporate members: Laserline and Vulcan Energy. Defendant W. Mark Eddington is an officer of LVEL. The individual Vulcan defendants, Ford Graham and Kevin Davis, are officers of the corporate Vulcan defendants, including Vulcan Energy, but are not members of LVEL (*see id.* at ¶ 19). The corporate Vulcan defendants are various corporations and limited liability companies containing the name "Vulcan" that have been formed by Graham and Davis for other business purposes.

Plaintiffs are three individuals and one corporation who claimed to have loaned money to LVEL in 2004 for purposes of the transaction at issue (*see id.* at ¶ 43). The terms of plaintiffs' transaction with LVEL are embodied in written loan documents consisting of Loan and Security Agreements and Promissory Notes that were given separately by LVEL to each of the plaintiffs (the "Loan Documents").

Each of the plaintiffs entered into identical Loan Documents with LVEL. Specifically, plaintiffs allege that each of them entered into a Loan and Security Agreement ("the LSA") with LVEL (*see* Aff of Michael C. Schmidt ["Schmidt Aff"], Exh B). The LSA expressly states that it is entered into only by LVEL as "Owner" and the particular plaintiff as "Lender" (LSA at 1). Plaintiffs were also provided with unsigned loan solicitation

documents known as Construction Loan Requests, which similarly identified the lone prospective "Borrower" as LVEL.

The LSA provides that LVEL will issue a promissory note to plaintiffs in exchange for a loan made by plaintiffs to LVEL to be used as a part of the proceeds that LVEL would give to Vulcan AMPS to manufacture the VAMPS Unit. In the LSA, LVEL grants a certain "first priority security interest" to the plaintiffs as collateral, and makes certain representations, warranties and covenants to plaintiffs (*see* LSA,at 1, 4-6).

Plaintiffs' allege that they were each given a promissory note by LVEL, as contemplated in the LSA (*see* Amended Complaint at ¶¶ 65-72; Schmidt Aff, Exh C [the "Promissory Notes"]). The face of the promissory note itself demonstrates that the note is solely between LVEL as "Owner" and the particular plaintiff as "Lender" (Promissory Notes at 1). Pursuant to the promissory notes, LVEL is obligated to repay the plaintiffs: "on the sale and delivery of the Equipment as defined in the Loan and Security Agreement but in no event later than six months from the date hereof" (*id.*). LVEL is also obligated to pay plaintiffs an "investment banking fee" in addition to the loan principal and interest (*id.*).

The promissory notes given by LVEL are identical, except for the particular plaintiff's name, amount of loan and date, and each of the notes makes clear that it is subject to the terms of the LSA, and that the collateral held by plaintiffs as security under the LSA is held by plaintiffs as security for the promissory note with LVEL (*id.* at 2).

The promissory notes also contain two critical statements. First, the promissory notes unequivocally state that in the event of a default, plaintiffs may look only to LVEL for amounts due under the LSA, and expressly limit plaintiffs' rights upon default to any proceeds, if any, obtained by LVEL from the construction and sale of the VAMPS Unit:

> "All payments of principal and interest on this Promissory Note, and all payments of any other amounts due hereunder or under the Loan Agreement *will be made solely from the Security and only to the extent that* [*LVEL*] *shall have income or proceeds from the Security*. [Plaintiff] agrees that it will look *solely to the Security to the extent available for distribution* as herein provided" (Promissory Note, at 2 [emphasis added]).

Therefore, to the extent that plaintiffs seek damages amounting to the loan repayments to which they claim they are entitled under the Loan Documents, plaintiffs' sole remedy is against LVEL.

Second, the promissory notes unequivocally state that there will be no personal liability for any amounts that may be due, or any representations that may be made, and that plaintiffs' rights are limited to claims against the security that LVEL gave to plaintiffs:

> "[LVEL] will not be personally liable to [plaintiffs] for any amounts payable under this Promissory Note or for any other amounts payable or any liability under the Loan Agreement or this Promissory Note. All and each of the representations, warranties, undertakings and agreements made in the Loan Agreement on the part of [LVEL] are made and intended not as personal representations, warranties, undertakings and agreements by or for the purpose or with the intention of binding [LVEL] personally but are made and intended for the purpose of

> binding only the Security. No personal liability or responsibility is assumed by [LVEL] hereunder or under the Loan Agreement and no such personal liability shall at any time be enforceable against [LVEL] on account of any representation, warranty, undertaking or agreement of [LVEL] hereunder or under the Loan Agreement either expressed or implied, all such personal liability, if any, being expressly waived by [plaintiffs]" (*id.*).

Plaintiffs loaned their money to LVEL, pursuant to the Loan Documents, as part of the funds to be raised by LVEL, together with other investors in addition to plaintiffs, to pay for the construction of the VAMPS Unit by Vulcan AMPS. As plaintiffs allege, however, the underlying reason for the alleged failure of the transaction was that "LVEL had raised only a portion of the full $5,000,000.00 which it had committed to raise as its share of the construction cost of the VAMPS [Unit,] and was never able to raise anywhere near the full $5,000,000.00" (Amended Complaint at ¶ 82). Consequently, the VAMPS Unit was not constructed, and plaintiffs' loans were not repaid.

ANALYSIS

MOTIONS TO DISMISS THE COMPLAINT BY THE LASERLINE AND VULCAN DEFENDANTS (MOTION SEQUENCE NOS. 003 AND 004)

Although on a motion to dismiss a complaint pursuant to CPLR 3211 (a) (7), "the pleading is to be afforded a liberal construction," and "the facts as alleged in the complaint [are presumed] as true" (*Leon v Martinez*, 84 NY2d 83, 87 [1994]; *see also Rovello v Orofino*

Realty Co., 40 NY2d 633 [1976]), "'factual claims [that are] either inherently incredible or flatly contradicted by documentary evidence are not entitled to such consideration'" (*Mark Hampton, Inc. v Bergreen*, 173 AD2d 220, 220 [1st Dept 1991] [citation omitted], *lv denied* 80 NY2d 788[1992]; *see also Wilhelmina Models, Inc. v Fleisher*, 19 AD3d 267, 269 [1st Dept 2005] ["Factual allegations presumed to be true on a motion pursuant to CPLR 3211 may properly be negated by affidavits and documentary evidence"]).

Here, each of the causes of action contained in the amended complaint is legally deficient on its face. Accordingly, defendants' motions to dismiss the amended complaint are granted.

Plaintiffs assert 26 causes of action in the amended complaint. However, virtually all of the operative allegations of the amended complaint that form the basis of these causes of action are pled solely "upon information and belief." Because these operative allegations are all alleged only "upon information and belief," the amended complaint is defective, and must be dismissed for that reason alone (*see Angel v Bank of Tokyo-Mitsubishi, Ltd.*, 39 AD3d 368 [1st Dept 2007] [allegations in complaint made upon information and belief are insufficient to withstand a motion to dismiss]; *Mandarin Trading Ltd. v Wildenstein*, 17 Misc 3d 1118[A], 2007 NY Slip Op 52059[U], * 5 [Sup Ct, NY County 2007], *affd* 65 AD3d 448 [1st Dept 2009] [allegation based upon information and belief "is simply a conclusory claim or statement unsupported by factual evidence," and, as such, "the bald allegation is not entitled

to preferential consideration" on a motion to dismiss]; *see e.g. Belco Petroleum Corp. v AIG Oil Rig, Inc.*, 164 AD2d 583 [1st Dept 1991] [complaint dismissed for failure to state a claim where plaintiff's allegations of defendant's patterns and practices were made "upon information and belief" and thus were wholly conclusory]).

In any event, even putting aside this fatal flaw, the causes of action set forth in the amended complaint otherwise fail to state a cause of action as a matter of law, and must be dismissed.

Alternative Breach of Contract Claims (2nd Second Through 6th Causes of Action)

Plaintiffs assert five breach of contract claims against LVEL, four of which relate to the specific promissory notes in favor of each of the plaintiffs, and one of which alleges that defendants breached their contractual obligations as represented by the entire transaction. Collectively, plaintiffs claim that LVEL breached the Loan Documents by failing to repay the funds that LVEL borrowed from those plaintiffs. However, the express terms of the loan documents preclude these claims.

As plaintiffs acknowledge in the amended complaint, prior to loaning LVEL funds, they each expressly agreed that all payments "due hereunder or under the [LSA] will be made solely from the Security *and only to the extent that [LVEL] shall have sufficient income or proceeds from the Security*" (Promissory Notes at 2 [emphasis added]). Plaintiffs further

agreed that "[*LVEL*] *will not be personally liable to* [*plaintiffs*] *for any amounts payable under this Promissory Note or for any other amounts payable or any liability under the* [*LSA*] *or this Promissory Note*" (*id.* [emphasis added]).

Thus, the plain language of the promissory notes demonstrates that plaintiffs loaned LVEL money in the hope that LVEL would generate revenue, and that they each expressly acknowledged that if LVEL failed to do so, they would have no recourse. Because LVEL indisputably failed to generate any revenue, plaintiffs' breach of contract claim fails.

Although plaintiffs argue that they are not bound by the express limitation set forth in the promissory notes, the law is well settled that where, as here, a party agrees to limit its own recovery, such agreements are routinely enforced. For example, in *Wynne v Equilease* (1995 WL 764236 [SD NY 1995]), the Court upheld a limiting provision in a loan document which provided that "the Lessee's obligation to repay the Aircraft loan will be limited to the amount of net rental and foreclosure proceeds the Lessee actually derives from the Equipment" (*id.* at * 2; *see also Matter of Integrated Resources*, 123 BR 181, 183, 185 [Bankr SD NY 1991] [holding that "(t)he standard form promissory notes delivered by (the defendant) and accepted by (the plaintiffs) contained provisions with broad restrictions on the recourse available to them for repayment from (the defendant) in the event of a payment default by (the defendant)" and "in light of the limited recourse provision in the Notes, the demand for payment and the lack thereof-alone, does not give rise to a cause of action"];

Land Mine Enters. v Sylvester Builders, 74 F Supp 2d 401 [SD NY 1999], *affd* 234 F3d 1262 [2d Cir 2000] [contractual provision limiting recovery to face amount of certain bonds was enforceable to preclude recovery of liquidated damages that exceeded the face amount of the bonds]; *Fruition, Inc. v Rhoda Lee, Inc.*, 1 AD3d 124, 125 [1st Dept 2003] ["The damages for which a party may recover for a breach of contract are such as ordinarily and naturally flow from the non-performance . . . if the contract is made with reference to special circumstances, fixing or affecting the amount of damages, such special circumstances are regarded within the contemplation of the parties, and damages may be assessed accordingly"] [internal quotation marks and citation omitted]).

Plaintiffs also claim that the Laserline defendants are estopped from claiming any limitation of recovery because they fraudulently induced plaintiffs into entering into the Loan Documents, and breached such documents. In support of that argument, plaintiffs rely on *Turkish v Kasenetz* (27 F3d 23 [2d Cir 1994]). Their reliance on this case, however, is misplaced. In *Turkish*, the parties had previously entered into a settlement agreement in which the defendants expressly and fraudulently represented that certain loans had been repaid, while knowing such representation to be false when made. The Court rejected the application of a limitation of liability provision, troubled by the defendants' false representation in the settlement agreement that certain accountants had reviewed the relevant books and records and confirmed that the loans had been repaid.

In *Harsco Corp. v Segui* (91 F3d 337 [2d Cir 1996]), the Second Circuit drew a distinction from its decision in *Turkish*. In *Harsco*, in addition to a limitation of liability provision, the agreement at issue also contained a representation disclaimer clause. "We further distinguished a contract (such as the one here) which 'specifically disclaims the existence of' the representations which plaintiffs claims are fraudulent . . . *Turkish* does not apply" (*id.* at 344-45). Here, as in *Harsco*, the operable loan agreements, in addition to containing a limitation of liability provision, also contain a representation clause:

> All and each of the representations, warranties, undertakings and agreements made in the Loan Agreement on the part of [LVEL] are made and intended *not as personal representations, warranties, undertakings and agreements* by or for the purpose or with the intention of binding Owner personally but are made and intended for the purpose of binding only the Security (Promissory Notes at 2).

Thus, here, as in *Harsco, Turkish* does not apply. Accordingly, plaintiffs' breach of contract claims are barred by the express terms of the agreements that they claim were breached, and must be dismissed.

Common-Law Fraud (1st Cause of Action); Alternative Fraud (12th and 13th Causes of Action)

The first cause of action for fraud is asserted against both the Vulcan and the Laserline defendants. The twelfth and thirteenth causes of action for alternative fraud are asserted against Ford Graham and Vulcan AMPS.

Plaintiffs' first cause of action for fraud is duplicative of their breach of contract claims and must be dismissed. As more specifically set forth below, plaintiffs allege only that certain representations contained in the various Loan Documents were false, and that defendants had no intention of complying with any obligations contained in the Loan Documents.

It is well settled that "[a] fraud claim that only restates a breach of contract claim may not be maintained" (*Orix Credit Alliance, Inc. v R.E. Hable Co.*, 256 AD2d 114, 115 [1st Dept 1998]). Because plaintiffs' first cause of action for fraud is duplicative of their breach of contract claim, the first cause of action must be dismissed.

A review of plaintiffs' fraud cause of action reveals that plaintiffs took every substantive statement contained in the Loan Documents and then claimed that they were all "falsely and/or materially misleading" when made. For example, plaintiffs allege that, in the Construction Loan Requests circulated to them by defendants, which sought to raise $2,500,000 for the construction and sale of the VAMPS Unit:

- Defendants "falsely and/or in a materially misleading manner represented to each of the Plaintiffs in the Construction Loan request that: . . . 'Vulcan will provide $5,500,000 of the construction cost to the joint venture" (Amended Complaint at ¶ 32);
- Defendants "falsely and/or materially misleadingly represented in the Construction Loan request that: '[Laserline] will provide $5,500,000 of the construction cost'" (*id.* at ¶ 33);
- Defendants "falsely and/or materially misleadingly represented in the Construction Loan Request that: 'We presently have a purchase order from Veteren, S.A. for four units at a purchase price of $14,500,000.00 each'" (*id.* at ¶ 34);
- Defendants "falsely and/or materially misleadingly represented in the Construction Loan Request that: 'This transaction represents only one unit but a second unit is contemplated on the same basis'" (*id.* at ¶ 35); and
- Defendants "falsely and/or materially misleadingly represented in the Construction Loan Request that: 'It will take only 60-75 days to complete the first unit'"(*id.* at ¶ 36).

The alleged fraudulent statements are the very contractual statements that plaintiffs allege were breached.

Next, plaintiffs allege that statements contained in the LSA were "false and/or materially misleading," and were thus fraudulent. For instance, plaintiffs allege that:

- Defendants "falsely and/or materially misleadingly represented in the Preamble of the LSA that: . . . 'the proceeds of issuance of the Promissory Note are to be applied to the cost of manufacturing one (1) Vulcan Advanced Mobile Power System manufactured by Vulcan AMPS, LLC'" (Amended Complaint at ¶ 47);
- Defendants "falsely and/or materially misleadingly represented in the Granting Clause of the LSA: . . . 'to secure the prompt payment of the principal of and interest on, and all other amounts due with respect to, the Promissory Note from time to time and all other amounts owing to Lender hereunder'" (*id.* at ¶ 48);

- Defendants "falsely and/or materially misleadingly represented in § 2.06 of the LSA that: 'The Owner has no subsidiaries or affiliates, including without limitation any combined or owned interest exceeding 10% as disclosed herein'" (*id.* at ¶ 49); and
- Defendants "falsely and/or materially misleadingly represented in § 2.07 of the LSA that: 'The proceeds of the Loan shall be used by the Owner in connection with the Equipment only'" (*id.* at ¶ 50).

Again, these alleged fraudulent statements are the very contractual statements that plaintiffs allege were breached.

Plaintiffs also allege that the statements made in the Promissory Notes were fraudulent (*see id.* at ¶¶ 77-78). Plaintiffs further allege that "because of the foregoing," certain quoted representations in the Construction Loan Requests "and/or in the Promissory Notes and/or in the Performance Bond" were "false and/or materially misleading when made" (*see id.* at ¶¶ 83-89, 94, 96, 98).

The alleged fraudulent representations upon which plaintiffs rely are the same promises and representations contained in the written Loan Documents that they allege were breached, and therefore, plaintiffs' fraud claims are clearly duplicative of their contract claim. Indeed, in opposition to the motion, plaintiffs specifically concede that "The Construction Loan Request contains numerous representations of fact, many of which have turned out to be false" (Mem in Opp at 31).

In *J.E. Morgan Knitting Mills, Inc. v Reeves Bros., Inc.* (243 AD2d 422 [1st Dept 1997]), plaintiffs sued in contract and in tort alleging that certain representations made in

their contract documents were false. The First Department affirmed the lower court's dismissal of the fraud claim for failure to state a cause of action:

> Plaintiffs' cause of action for fraud, which alleges that defendants knew at the time of contract execution that their warranty therein against undisclosed liabilities burdening the property was false, was properly dismissed as duplicative of plaintiffs' cause of action for breach of contract. The fraud alleged is based on the same facts as underlie the contract claim and is not collateral to the contract and no damages are alleged that would not be recoverable under a contract measure of damages (*id.* at 423).

Similarly, in a virtually identical case, *Sterling Natl. Bank v Park Ave. Bank* (2006 NY Misc LEXIS 2888 [Sup Ct, NY County 2006]), the parties entered into a loan purchase agreement, pursuant to which plaintiff purchased a certain portfolio of loans from defendants. Plaintiff subsequently commenced an action alleging that certain representations and warranties that defendant made in the agreement were fraudulent, resulting in the default by underlying lenders, and ultimately, damage to plaintiff. The court dismissed plaintiff's fraud claim, holding, among other things, that "the cause of action is a claim for breach of the representations and warranties in the Agreement which [plaintiff] has attempted to transform into fraud claims" (*id.* at *15).

Plaintiffs also allege, in a conclusory fashion, that defendants did not intend to perform any obligations contained in the Loan Documents. Those allegations fail as a matter of law since a "plaintiff cannot transform a breach of contract claim into a fraud claim" when the alleged fraud was merely that defendant had "entered [into an] agreement while intending

not to perform it" (*Angel v Bank of Tokyo-Mitsubishi, Ltd.*, 39 AD3d at 369; *see also New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 316 [1995] ["where a party is merely seeking to enforce its bargain, a tort claim will not lie"]).

Thus, the tort-based fraud claims advanced by plaintiffs are nothing more than an attempt to recast their failed contract claims. In fact, plaintiffs seek as remedies for the fraud cause of action precisely the same dollar amounts as they seek in their contract-based causes of action, which happen to be the amounts they claim to be owed under the Loan Documents (*see* Amended Complaint, Wherefore Clause, at 84-85).

Accordingly, because the fraud cause of action is based on the same allegations as set forth in the breach of contract causes of action, defendants are entitled to dismissal of this cause of action (*see e.g. New York Univ.*, 87 NY2d at 318 [affirming dismissal of fraud claim, where plaintiff alleged "nothing more than a breach of the contract and any covenants implied"]). Plaintiffs have also failed to allege either collateral or extraneous misrepresentations, or damages distinct from their breach of contract claims, as they must, to avoid dismissal of these causes of action (*see e.g. Krantz v Chateau Stores of Canada Ltd.*, 256 AD2d 186 [1st Dept 1998]).

The twelfth and thirteenth causes of action for alternative fraud against Ford Graham and Vulcan AMPS suffer from the same fatal flaw as the common-law fraud claim–plaintiffs allege only that certain representations contained in the various Loan Documents were false

and that Graham and Vulcan AMPS had no intention of complying with any obligations contained in those loan documents (*see* Amended Complaint at ¶¶ 223-229). Thus, these causes of action must be dismissed as well.

Alternative Conversion Claims (7th, 8th, 9th, 10th and 11th Causes of Action)

In their conversion claims, plaintiffs allege that one or more of the Vulcan defendants took money from LVEL and used that money for reasons other than those described in the Loan Documents between plaintiffs and LVEL.

However, because the conversion claims are based on plaintiffs' assertion that the Loan Documents were breached and that their loan funds were not used as promised in the Loan Documents, they are nothing more than reformulated contract claims. Moreover, except for the punitive damages that plaintiffs seek, the "Wherefore Clause" demonstrates that the damages they seek in their 7th through 11th causes of action are the same dollar amounts that they claim in their contract causes of action that they are owed under the Loan Documents (*see* Amended Complaint, Wherefore Clause, at 85-86). Accordingly, these tort-based conversion claims are duplicative of plaintiffs' contract claims.

It is black letter law that "[a] cause of action for conversion cannot be predicated on a mere breach of contract" (*Fesseha v TD Waterhouse Investor Services, Inc.*, 305 AD2d 268, 269 [1st Dept 2003] [dismissing plaintiff's conversion claim that "'allege[d] no

independent facts sufficient to give rise to tort liability' and, thus, was nothing more than a restatement of his breach of contract claim"] [citation omitted]; *see also M.D. Carlisle Realty Corp. v Owners & Tenants Elec. Co., Inc.*, 47 AD3d 408 [1st Dept 2008] [plaintiff's cause of action for conversion dismissed as duplicative of contract claim]; *Retty Financing, Inc. v Morgan Stanley Dean Witter & Co.*, 293 AD2d 341, 341 [1st Dept 2002] ["Plaintiff's conversion and breach of fiduciary duty claims were also properly dismissed, since they are duplicative of the breach of contract cause of action"]).

As the First Department ruled in *Richbell Information Serv., Inc. v Jupiter Partners, L.P.* (309 AD2d 288 [1st Dept 2003]):

> [Plaintiff's] twenty-third cause of action, for conversion . . . was properly dismissed as duplicative of the insufficient contract claims. We are not persuaded by [plaintiff's] argument that conversion is a wrong qualitatively different from a mere breach of contract, so that it is not duplicative; such reasoning would resuscitate every redundant tort claim, regardless of its theory (*id.* at 306).

As a result, the seventh through eleventh causes of action must be dismissed.

Alternative Intentional Interference With Contract Claim (14th Cause of Action)

In their fourteenth cause of action, plaintiffs assert that both the Vulcan and Laserline defendants "had knowledge of the agreement between the Plaintiffs and LVEL by which each of the Plaintiffs had given over their monies for the specific purpose of having a

VAMPS unit constructed by Vulcan AMPS" (Amended Complaint at ¶ 244) and then entered into certain conduct with the purpose of "frustrating and preventing the fulfillment of said agreement between the Plaintiffs and LVEL and causing a breach of said agreement" (*id.* at ¶ 248).

New York courts consistently apply the doctrine that recognizes the essential distinction between a corporation and those individuals who administer its affairs, as well as the fact that sound public policy restricts the imposition of liability on corporate officers and directors for the acts of the corporation (*see Petkanas v Kooyman*, 303 AD2d 303 [1st Dept 2003]). Thus, it is well settled that a corporate officer or director is not personally liable to a party for an alleged breach of the corporation's contract with that party, since imposing liability in tort against a corporation's principals would be antithetical to the well-recognized purpose of incorporation (*see Foster v Churchill*, 87 NY2d 744 [1996]; *Appell v LAG Corp.*, 41 AD3d 277 [1st Dept 2007]). As a result, "[a] cause of action seeking to hold corporate officials personally responsible for the corporation's breach of contract is governed by an enhanced pleading standard" (*Joan Hansen & Co. v Everlast World's Boxing Headquarters Corp.*, 296 AD2d 103, 109 [1st Dept 2002]).

Generally, New York courts have "construed such a standard to require a particularized pleading of allegations that the acts of the defendant corporate officers which resulted in the tortious interference with contract either were beyond the scope of their

employment or, if not, were motivated by their personal gain, as distinguished from gain for the corporation" (*Petkanas*, 303 AD2d at 305). New York courts have interpreted "personal gain" to mean that the challenged acts were undertaken "with malice and were calculated to impair the plaintiff's business for the personal profit of the [individual] defendant" (*Joan Hansen & Co.*, 296 AD2d at 110; *accord Hoag v Chancellor, Inc.*, 246 AD2d 224, 228 [1st Dept 1998] [internal quotation marks and citation omitted] ["To establish a corporate officer's liability for inducing a breach of a contract between the corporation and a third party, the complaint must allege that the officer's . . . acts were taken outside the scope of their employment or that they personally profited from their acts"]).

In essence, plaintiffs seek to hold the two corporate members of LVEL, and the individual members of the corporate members of LVEL, liable for the same breach of the contract entered into only by LVEL. However, the First Department has explicitly rejected plaintiffs' theory:

> "[T]he existence of a plausible claim for breach of contract does not, without more, provide a basis for the assertion of a cause of action for interference with contractual relations against those corporate officers and directors whose actions brought about the asserted breach . . . '[a]n officer or director of a corporation is not personally liable to one who has contracted with the corporation on the theory of inducing a breach of contract, merely due to the fact that, while acting for the corporation, he has made decisions and taken steps that resulted in the corporation's promises being broken'" (*Joan Hansen & Co.*, 296 AD2d at 108-109).

Plaintiffs also fail to allege that the individual Vulcan or Laserline defendants acted outside their corporate capacity. Furthermore, their conclusory allegation that defendants may have, "upon information and belief," "determined to take and utilize the investment monies for their own use, benefit, pleasure and business" (Amended Complaint at ¶ 246), falls far short of the heightened pleading requirement that must be met for plaintiffs to get around the general rule that these parties cannot be held personally liable for the alleged breach of a corporate obligation.

Thus, the fourteenth cause of action must be dismissed (*see Petkanas v Kooyman*, 303 AD2d 303 [corporation's majority shareholders were not personally liable for tortious interference with corporate officer's employment contract, absent allegations that they personally benefitted from their actions, and that such was their motivating intent]; *S.F.P. Realty Corp. v G.S. Rockaway Dev., Inc.*, 206 AD2d 417 [2d Dept 1994] [cause of action for tortious interference with contract against shareholder, director and officer of corporation dismissed where plaintiff failed to allege any independent tort or predatory acts directed against another]).

Quantum Meruit (15th Cause of Action)

In their fifteenth cause of action, plaintiffs allege that "in receiving and utilizing the Investment Monies," the Vulcan and Laserline defendants "obtained a very large benefit to

which [defendants] were not entitled and the retention of which would be unconscionable" (Amended Complaint at ¶ 251).

However, plaintiffs are precluded from asserting a cause of action sounding in quasi-contract, such as a quantum meruit claim, if there is a written contract that covers the matter at issue (*Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 [1987] ["The existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter"]; *Goldstein v CIBC World Markets Corp.*, 6 AD3d 295, 296 [1st Dept 2004] ["A claim for unjust enrichment, or quasi contract, may not be maintained where a contract exists between the parties covering the same subject matter"]). Since plaintiffs seek the recovery of their loan amounts that were made pursuant to written contracts–the Loan Documents–plaintiffs may not maintain a cause of action sounding in quantum meruit, and their fifteenth cause of action must be dismissed (*see De La Cruz v Caddell Dry Dock & Repair Co.*, 22 AD3d 404, 405 [1st Dept 2005] [dismissing plaintiff's quantum meruit claim, holding that "(t)he existence of an enforceable written contract covering the matter at issue precludes recovery for causes of action sounding in quasi-contract"]).

Constructive Trust (16th Cause of Action)

In their sixteenth cause of action, which is asserted solely against the Vulcan defendants, plaintiffs request that, "because of the fraud and conversion practiced by Ford Graham," the court impose a constructive trust on unspecified "monies or property" of the Vulcan defendants in the amount of $900,000, "representing the value of the Investment Monies taken from" plaintiffs (Amended Complaint at ¶ 254). However, to the extent that plaintiffs request such a remedy in the form of a separate cause of action, it cannot be sustained, because a constructive trust is a remedy that may be imposed only with a successful showing of an underlying predicate cause of action. It is not a separate cause of action (*see Stewart v Maitland*, 39 AD3d 319, 319 [1st Dept 2007] ["In view of the dismissal of the fraud cause of action, there was no predicate for plaintiff's request to impose a constructive trust"]). Accordingly, because the fraud and conversion claims are being dismissed, the constructive trust claim must be dismissed as well (*see id.*).

Moreover, a constructive trust is an equitable remedy that should not be imposed where a monetary remedy would be sufficient (*see e.g. Evans v Winston & Strawn*, 303 AD3d 331, 333 [1st Dept 2003] ["Plaintiffs' claim for a constructive trust was properly dismissed since plaintiffs do not claim that (defendant) is unable to repay plaintiff's capital contributions, and it does not otherwise appear that the legal remedy of damages will be inadequate"]; *see also Bertoni v Catucci*, 117 AD2d 892 [3d Dept 1986]).

In the amended complaint, plaintiffs do not identify particular property over which a constructive trust needs to be imposed, but rather refer to the "value" of the monies that plaintiffs loaned to LVEL. Plaintiffs do not allege that the various legal remedies they seek in the amended complaint would be insufficient, and also not allege that they could not recover a money judgment against LVEL in the amount of the loan payments they seek to recover if successful in their contract claim against LVEL. Rather, plaintiffs make clear in the Wherefore Clause that they only seek a constructive trust generally against all of defendants' assets to recover the amounts allegedly due from LVEL under the Loan Documents (*see* Amended Complaint, Wherefore Clause, at 87).

Furthermore, plaintiffs also fail to demonstrate that a fiduciary relationship existed between them and the Vulcan defendants, which is fatal to their constructive trust claim (*see Wachovia Sec., LLC v Joseph*, 56 AD3d 269, 271 [1st Dept 2008] ["the absence of a fiduciary relationship defeats any entitlement to a constructive trust"]). Accordingly, the sixteenth cause of action is dismissed.

Negligence of Mark Eddington – Liability to LVEL and Plaintiffs (18th and 19th Causes of Action)

Plaintiffs claim that defendant Mark Eddington was negligent in failing to do a variety of things, some of which were to benefit LVEL (eighteenth cause of action) and plaintiffs (nineteenth cause of action).

However, the eighteenth cause of action must be dismissed because plaintiffs are not members of LVEL and thus have no standing to assert a claim on behalf of LVEL. In opposition to the motion, plaintiffs claim that the attorney-in-fact provision of the LSA creates the necessary legal standing. This provision states that:

> "[LVEL] does hereby irrevocably constitute and appoint [plaintiff] the true and lawful attorney-in-fact of [LVEL] (which appointment is coupled with an interest) for the purpose of taking any action permitted by this Loan Agreement in connection with the enforcement of the Lien of this Loan Agreement, with full power (in the name of the Owner or otherwise) to ask, require, demand and receive any and all amounts and claims for amounts due and to become due under or arising out of any documents or agreements between [LVEL] and third-parties regarding the Security including the Equipment (to the extent that such moneys and claims constitute part of the Security), to endorse any check or other instrument or order in connection therewith and to file any claim or take any action or institute any proceeding to collect any portion of the Security" (LSA at 2).

However, this provision does not create legal standing for plaintiffs to sue on behalf of LVEL. Plaintiffs clearly do not seek any sums purportedly due by Eddington to LVEL under any agreement between Eddington and LVEL. Nor do plaintiffs seek to endorse any check or other instrument or order in connection with the collateral given as security under

the LSA and do not seek to collect any portion of the actual collateral given as security under the LSA.

With respect to the nineteenth cause of action, plaintiffs claim that Eddington is liable to them for acting "in a grossly negligent, reckless, irresponsible and unprofessional manner." However, plaintiffs fail to allege any of the requisite elements to properly assert a negligence claim.

The elements of a cause of action for negligence are "'(1) the existence of a duty on defendant's part as to plaintiff; (2) a breach of this duty; and (3) injury to the plaintiff as a result thereof'" (*Rodriguez v Budget Rent-a-Car Sys., Inc.*, 44 AD3d 216, 221 [1st Dept 2007], quoting *Akins v Glens Falls City School Dist.*, 53 NY2d 325, 333 [1981]). However, plaintiffs fail to allege that Eddington owed any duty of care to plaintiffs (*Lauer v City of New York*, 95 NY2d 95, 100 [2000] ["Without a duty running directly to the injured person there can be no liability in damages, however careless the conduct or foreseeable the harm"]; *Di Cerbo v Raab*, 132 AD2d 763, 764 [3d Dept 1987] ["Negligence consists of a breach of a duty of care owed to another"]). Indeed, Eddington was simply the principal of an entity involved in an arm's-length contractual relationship with plaintiffs. "In general, there is no duty of care between parties to an arms-length business relationship" (*Technical Support Servs., Inc. v International Business Machines Corp.*, 18 Misc 3d 1106[A], 2007 NY Slip Op

52428[U], * 28 [Sup Ct, Westchester County 2007], citing *Atkins Nutritionals, Inc. v Ernst & Young, LLP*, 301 AD2d 547, 548-549 [2d Dept 2003]).

Moreover, plaintiffs' failure to allege a duty or "special relationship" would also prove fatal to a gross negligence claim, if that is what the plaintiffs had intended to assert (*see Martian Entertainment, LLC*, 12 Misc 3d 1190[A]). Accordingly, the eighteenth and nineteenth causes of action are dismissed.

Alternative Third-Party Beneficiary Claim (20th Cause of Action)

In their twentieth cause of action, plaintiffs refer to an agreement between LVEL and the Vulcan defendants, pursuant to which the Vulcan defendants were required to meet certain obligations and perform certain duties to LVEL, and allege that the Vulcan defendants "knew or should have known" that plaintiffs and other unnamed non-parties were the source of the money that LVEL gave to the Vulcan defendants and that, as a result, the terms of the agreement between LVEL and the Vulcan defendants must have been "for the benefit of the Plaintiffs as well as for the benefit of LVEL" (Amended Complaint at ¶ 267).

However, plaintiffs cannot recover under the alternate theory that they are third-party beneficiaries to any agreement between LVEL and the Vulcan defendants unless it clearly appears from the provisions of the agreement that LVEL and the Vulcan defendants intended to confer a direct benefit on plaintiffs (*Port Chester Elec. Constr. Corp. v Atlas*, 40 NY2d

652 [1976]; *Bernal v Pinkerton's, Inc.*, 52 AD2d 760 [1st Dept 1976], *affd* 41 NY2d 938 [1977]).

Only an intended beneficiary of a contract may maintain an action as a third party (*Artwear, Inc. v Hughes*, 202 AD2d 76 [1st Dept 1994]; *Alicea v City of New York*, 145 AD2d 315 [1st Dept 1988]). In order for a contract to confer enforceable third-party beneficiary rights, the contract language must clearly evidence "an intent to permit enforcement by the third party" (*Fourth Ocean Putnam Corp. v Interstate Wrecking Co.*, 66 NY2d 38, 45 [1985]; *accord Binghamton Masonic Temple, Inc. v City of Binghamton*, 213 AD2d 742 [3d Dept 1995], *lv denied* 85 NY2d 811 [1995]).

There is no allegation in the amended complaint demonstrating that LVEL and the Vulcan defendants clearly intended to confer a direct benefit on plaintiffs in any separate agreement between LVEL and the Vulcan defendants. The fact that one or more of the Vulcan defendants may have known that plaintiffs were among those sources of the funds raised by LVEL falls far short of the required showing that any agreement between LVEL and the Vulcan defendants expressed a clear intent to confer a benefit on plaintiffs directly from that agreement. Moreover, the fact that plaintiffs loaned money to LVEL and the fact that LVEL entered into a separate agreement with the Vulcan defendants pertaining to the use of monies given to LVEL by plaintiffs and others, does not elevate plaintiffs to the status of intended third-party beneficiaries entitled to sue for an alleged breach of the agreement

between LVEL and the Vulcan defendants. Accordingly, the twentieth cause of action must be dismissed.

Negligent Misrepresentation By Mark Eddington (21st Cause of Action)

In their twenty-first cause of action, plaintiffs allege that "the statements and wording of the Construction Loan Request and/or the LSA and/or the Promissory Notes and/or the Performance Bond and/or the circulation and distribution of one or more of such documents was materially misleading in such ways that when relied upon . . . by each of the Plaintiffs . . . such acts and statements uttered by the Defendants constituted negligent misrepresentation" (Amended Complaint at ¶ 273).

"A claim for negligent misrepresentation requires the plaintiff to demonstrate (1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff; (2) that the information was incorrect; and (3) reasonable reliance on the information" (*J.A.O. Acquisition Corp. v Stavitsky*, 8 NY3d 144, 148 [2007]; *see also Fresh Direct, LLC v Blue Martini Software, Inc.*, 7 AD3d 487 [2d Dept 2004]). The failure to plead a fiduciary or similar relationship between the parties is generally fatal to the claim (*Rivas v Amerimed USA, Inc.*, 34 AD3d 250 [1st Dept 2006], *lv dismissed in part, denied in part* 8 NY3d 908 [2007]), particularly in the context of an arm's-length relationship

between a borrower and a lender (*Korea First Bank of N.Y. v Noah Enters., Ltd.*, 12 AD3d 321 [1st Dept 2004], *lv denied* 4 NY3d 710 [2005]).

Here, plaintiffs fail to allege that Eddington, who was merely the principal of an entity involved in an arm's length contractual relationship with plaintiffs, owed plaintiffs a duty of reasonable care. As such, the negligent misrepresentation cause of action must be dismissed (*see Sterling Natl. Bank,* 2006 NY Misc LEXIS 2888 at * 16 [court dismissed the plaintiff's negligent misrepresentation claim where the plaintiff had "not shown anything more than arms' length dealing between separate business entities, which does not give rise to a special relationship to support a cause of action for negligent misrepresentation"]).

Alternative New York State Securities Fraud (22nd Cause of Action)

Plaintiff's twenty-second cause of action seeks damages under section 352-c of the New York General Business Law (the "Martin Act"). The Martin Act, New York's blue sky law, prohibits a broad range of fraudulent and deceitful practices in advertising, distributing, exchanging, selling and purchasing securities within or from New York state (*see* General Business Law §§ 352, 352-c, 353). Under the Martin Act, the Attorney General has the exclusive authority to enforce its provisions, and has been "granted various investigatory, regulatory, and remedial powers aimed at detecting, preventing, and stopping fraudulent securities practices" (*Caboara v Babylon Cove Dev., LLC*, 54 AD3d 79, 81 [2d Dept 2008]).

The Court of Appeals has determined that there is no express or implied private right of action under the statute (*CPC Intl.*, 70 NY2d at 268). Instead, exclusive enforcement power rests with the Attorney General with respect to claims which fall within the Martin Act (*see Kerusa Co. LLC v W10Z/515 Real Estate Ltd. Partnership*, 12 NY3d 236 [2009]). "[P]rivate plaintiffs [are not] permitted through artful pleading to press any claim based on the sort of wrong given over to the Attorney-General under the Martin Act" (*Whitehall Tenants Corp. v Estate of Olnick*, 213 AD2d 200, 200 [1st Dept 1995], *lv denied* 86 NY2d 704 [1995]).

Apparently recognizing the fact that no private right of action exists under the Martin Act, plaintiffs assert in their opposition to the motions to dismiss that they "are withdrawing that particular claim here" (Mem in Opp at 25, n 4).

Alternative California State Securities Fraud (23rd Cause of Action)

Plaintiff's twenty-third cause of action alleges "upon information and belief" that "the taking of the Investment Monies . . . constituted a transaction involving the sale of securities" (Amended Complaint at ¶ 279) and seeks damages under sections 25110 and 25401 of the California Corporate Securities Law.[1] Section 25110 of the California law makes it unlawful

[1] Both the Promissory Notes and the LSAs specified that the law governing these documents was the law of California, though all three sets of parties cite New York law in support of, and in opposition to, the motions.

"for any person to offer or sell in this state any security in an issuer transaction." However, the loan documents make clear that the transactions at issue here are boilerplate loans whereby plaintiffs gave money to LVEL in exchange for certain promissory notes from it and that no securities were offered or sold. Indeed, the top of the first page of the promissory note given to each plaintiff by LVEL contains the same caption: "This Promissory Note has not been registered under the Securities Act of 1933, as amended, or any state securities law, and is subject to restrictions on transfer and sale" (Promissory Notes, Cover Page). Thus, the twenty-third cause of action must be dismissed as well.

Piercing the Corporate Veil (24th Cause of Action)

In their twenty-fourth cause of action, plaintiffs assert a claim for piercing the corporate veil against the Vulcan defendants. However, New York "does not recognize a separate cause of action to pierce the corporate veil" (*Hart v Jassem*, 43 AD3d 997, 998 [2d Dept 2007] [internal quotation marks and citation omitted]; *9 East 38th Street Associates, L.P. v George Feher Assocs., Inc.*, 226 AD2d 167 [1st Dept 1996]).

Moreover, a party seeking to pierce the corporate veil must establish that "(1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in the plaintiff's injury" (*Matter of Morris v New York State Dept.*

of Taxation and Finance, 82 NY2d 135, 141 [1993]; *see also TNS Holdings, Inc. v MKI Securities Corp.*, 92 NY2d 335, 339 [1998] ["Those seeking to pierce a corporate veil of course bear a heavy burden of showing that the corporation was dominated as to the transaction attacked and that such domination was the instrument of fraud or otherwise resulted in wrongful or inequitable consequences"]).

Plaintiffs' sole conclusory allegation that Ford Graham, Kevin Davis and John Doe served as overlapping officers, directors and employees in more than one of the corporate Vulcan defendants, and that the corporate Vulcan defendants were operated as alter egos (*see* Amended Complaint at ¶ 283), is insufficient to satisfy this heavy burden (*see Goldman v Chapman*, 44 AD3d 938, 939 [2d Dept 2007], *lv denied* 10 NY3d 702 [2008] [a bare claim that the corporation was "completely dominated by the owners, or conclusory assertions that the corporation acted as their 'alter ego'" will not give rise to piercing the corporate veil]). Accordingly, the twenty-fourth cause of action is dismissed.

Alternative Breach of Fiduciary Duty Claim (25th and 26th Causes of Action)

Plaintiff's twenty-fifth and twenty-sixth causes are asserted only against Mark Eddington (twenty-fifth cause of action) and Ford Graham (twenty-sixth cause of action) under a breach of fiduciary duty theory. In these causes of action, plaintiffs allege that Eddington and Graham were members of LVEL, and that they owed a duty of loyalty to

LVEL. However, as plaintiffs earlier admit in the amended complaint, neither Eddington nor Graham were members of LVEL (*see* Amended Complaint at ¶¶ 9, 10 [acknowledging that LVEL is made up of two members: Laserline Lease Finance Corp. and Vulcan Power Leasing, LLC]).

Moreover, plaintiffs contend that Eddington and Graham breached a fiduciary duty to LVEL, not to plaintiffs. However, such a claim must be brought by LVEL, not plaintiffs. Plaintiffs fail to allege that they have standing to seek recovery for any duty owed by Eddington and Graham to LVEL. In fact, the "Wherefore Clause" for these causes of action makes clear that they do not seek to stand in the shoes of LVEL and recover for a loss allegedly suffered by LVEL, as they request that they be awarded the same dollar amounts to which they claim they are entitled under the Loan Documents that they entered into with LVEL (*see* Amended Complaint, Wherefore Clause, at 89-90; *see also William Kaufman Organization, Ltd. v Graham & James L.L.P.*, 269 AD2d 171, 173 [1st Dept 2000] ["A cause of action for breach of fiduciary duty which is merely duplicative of a breach of contract claim cannot stand"]).

In any event, even if plaintiffs had standing to bring such a claim on behalf of LVEL, the amended complaint is devoid of any facts showing how a simple loan transaction amounted to a fiduciary relationship (*see WIT Holding Corp. v Klein*, 282 AD2d 527, 529 [2d Dept 2001] ["an arms-length business relationship does not give rise to a fiduciary

obligation"]; *Oursler v Women's Interart Center, Inc.*, 170 AD2d 407, 408 [1st Dept 1991] ["A conventional business relationship, without more, does not become a fiduciary relationship by mere allegation"]). Thus, the twenty-fifth and twenty-six causes of action are dismissed.

Attorney's Fees and Costs (17th Cause of Action)

Plaintiffs allege that, under the provisions of the LSA, "[b]ecause of the breaches of the agreement between LVEL and Plaintiffs . . . LVEL is liable to each of Plaintiffs for any and all costs, expenses and disbursements incurred in connection with this legal action and for any and all attorneys fees incurred or owed by each of the Plaintiffs as a result of the Plaintiffs instituting and prosecuting this legal action." Since each of the causes of action asserted against LVEL is being dismissed, this cause of action is dismissed as well. Accordingly, the motions to dismiss the amended complaint are granted, and the amended complaint is dismissed.

MOTION FOR DISQUALIFICATION (MOTION SEQUENCE NO. 002)

Since all of the causes of action listed in the amended complaint are dismissed, plaintiff's motion to disqualify the law firm of Gersten Savage LLP from representing the Laserline defendants is denied as moot (*see Rivas v Raymond Schwartzberg & Assocs.*,

PLLC, 52 AD3d 401 [1st Dept 2008]; *Prichard v 164 Ludlow Corp.*, 14 Misc 3d 1202[A], 2006 NY Slip Op 52381[U] [Sup Ct, NY County 2006], *affd* 49 AD3d 408 [1st Dept 2008] [dismissing motion to disqualify as moot in light of dismissal of complaint]).

CROSS MOTION TO AMEND THE AMENDED COMPLAINT (MOTION SEQUENCE NO. 003)

Plaintiffs seek to amend their complaint to add proposed causes of action for negligent misrepresentation under the California Code (twenty-first cause of action); breach of fiduciary duty against Ford Graham (twenty-seventh cause of action); statutory fraud under the California Corporation Code (twenty-eighth cause of action); constructive fraud under the California Code (twenty-ninth cause of action); mistake/rescission (thirtieth cause of action; an accounting (thirty-first cause of action); breach of the implied covenant of good faith (thirty-second cause of action); and lack of mutuality (thirty-third cause of action). Plaintiffs' cross motion for leave to serve a second amended complaint is denied

While leave to amend a plead is freely granted, a party moving for leave to amend must show that the proposed new claim is meritorious (*see Watts v Wing*, 308 AD2d 391 [1st Dept 2003]); *see also Non-Linear Trading Co., Inc. v Braddis Assocs., Inc.*, 243 AD2d 107, 116 [1st Dept 1998] ["in order to conserve judicial resources, an examination of the underlying merits of the proposed causes of action is warranted"]). If the proposed

amendment is without merit as a matter of law, leave to amend must be denied (*Spitzer v Schussel*, 48 AD3d 233 [1st Dept 2008]).

An examination of each of the proposed causes of action reveals that they lack merit as a matter of law.

Negligent Misrepresentation under the California Civil Code (21st Cause of Action)

The twenty-first cause of action in the first amended complaint asserted a claim only against Eddington under the theory of common law negligent misrepresentation. No statutory reference was relied upon in that cause of action. Now, the proposed twenty-first cause of action seeks to asserts a negligent misrepresentation claim also against the Vulcan defendants, and to assert that claim under Section 1572 of the California Civil Code, which codifies a California "actual fraud" standard. Specifically, plaintiffs allege that defendants are "guilty of negligent misrepresentation under the law of the State of California pursuant to California Civil Code § 1572 et seq." based on the alleged "false or misleading statements made in the Loan Documents" (Proposed Amended Complaint at ¶ 277).

However, this claim cannot stand because it is barred by the applicable statute of limitations. Section 338 (a) of the California Code of Civil Procedure provides for a three-year statute of limitations for an "action upon a liability created by statute." Because plaintiffs' own pleading alleges that the facts supporting that the proposed claim took place

in the fall of 2004 (*see id.* at ¶¶ 31-45, 47) or, at the latest, in April 2005, when LVEL issued the last Promissory Note (*see id.* at ¶¶ 73-74), plaintiffs' claim is barred by the applicable statute of limitations as this case was originally commenced on or about June 4, 2008.

Moreover, this statutory tort claim is, once again, nothing more than an improper attempt to recast the failed breach of contract claims.

Alternative Breach of Fiduciary Duty (27th Cause of Action)

In the proposed twenty-seventh cause of action, plaintiffs allege that Graham owed and breached a fiduciary duty directly to plaintiffs. However, plaintiffs fail to plead any facts demonstrating that Graham personally had a fiduciary relationship with plaintiffs, or how a conventional business relationship amounted to a fiduciary relationship.

Statutory Fraud Under California Law (28th Cause of Action)

In this cause of action, plaintiffs allege that "the taking of the Investment Monies by [defendants] in the manner described heretofore constituted a transaction involving the sale of securities" (*id.* at ¶ 319) and constituted a violation of California Corporation Law § 25401. However, as previously discussed, the transaction at issue was merely a loan, and not one involving the sale of securities.

Constructive Fraud Under California Law (29th Cause of Action)

In their twenty-ninth proposed cause of action, plaintiffs conclusorily allege that "upon information and belief" the relationship between the Laserline defendants and each of the plaintiffs was a "confidential relationship," and the "dereliction" by the Laserline defendants "of their respective duties toward the Plaintiffs" constituted constructive fraud under California Code § 1573 (*id.* at ¶ 322).

Again, plaintiffs fail to allege any facts demonstrating that a confidential relationship existed between the Laserline defendants and plaintiffs, or showing how a simple loan transaction amounted to a fiduciary relationship.

Mistake of Fact under California Law (30th Cause of Action)

In their thirtieth cause of action, plaintiffs assert a cause of action for mistake under California Civil Code § 1577. In support of the motion to amend, plaintiffs assert that they have a claim of mistake because they "were unaware that the transactions were actually securities for which the proper filings did not exist" (Pl Mem at 56). Because the transactions at issue were clearly loans, and not securities, this cause of action cannot stand.

Accounting (31st Cause of Action)

In their proposed thirty-first cause of action, plaintiffs request an accounting of defendants Vulcan Power Leasing LLC and Graham. However, plaintiffs' cause of action for an accounting is defective. In order to be entitled to an accounting, a party must establish the existence of a fiduciary relationship (*see Simons v Ross*, 309 AD2d 667, 667 [1st Dept 2003] ["In the absence of (a) . . . fiduciary relationship, plaintiff was not entitled to an equitable accounting"]; *A. Brod, Inc. v Worldwide Dreams, L.L.C.*, 4 Misc 3d 1006[A], 2009 NY Slip Op 50733[U] [Sup Ct, NY County 2004] [claim for an accounting dismissed on ground that there was no fiduciary relationship between the parties]). As previously discussed, plaintiffs fail to set forth any facts demonstrating the existence of a fiduciary relationship between plaintiffs and any of the defendants. Therefore, plaintiffs cannot state a cause of action for an accounting.

Implied Good Faith Covenant (32nd Cause of Action)

In their proposed thirty-second cause of action, plaintiffs assert that the Laserline defendants "have breached the covenant of good faith implied into the LSAs and Promissory Notes" (Proposed Amended Complaint at ¶ 333). This claim lacks merit. There is no separate cause of action for breach of the implied duty of good faith and fair dealing because it "'is merely a breach of the underlying contract'" (*Commerce and Indus. Ins. Co. v U.S.*

Bank Natl. Assn., 2008 WL 4178474, * 3 [SD NY 2008] [citation omitted]; *see also TeeVee Toons, Inc. v Prudential Sec. Credit Corp., LLC*, 8 AD3d 134, 134 [1st Dept 2004] [affirming dismissal of claim for breach of the implied covenant of good faith because it was "redundant" of breach of contract claim]). As such, this cause of action is "duplicative of the [underlying] cause[s] of action for breach of contract" (*New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 320 [1995]).

Lack of Mutuality (33rd Cause of Action)

In their proposed thirty-third cause of action, plaintiffs merely conclusorily assert that the agreement between the Laserline defendants and plaintiffs "as represented by the LSAs and the Promissory Notes lacks mutuality and is therefore void and ineffective and the Plaintiffs are entitled to rescission thereof" (Proposed Amended Complaint at ¶ 335). Plaintiffs provide no supporting allegations and, as such, these conclusory allegations are insufficient to demonstrate that this cause of action has merit.

The court has considered the remaining arguments, and finds them to be without merit.

Accordingly, it is hereby

ORDERED that the motions to dismiss (Motion Sequence Nos. 003 and 004) are granted, and the first amended complaint is dismissed, with costs and disbursements to defendants as taxed by the Clerk of the Court; and it is further

ORDERED that the motion to disqualify (Motion Sequence No. 002) is denied as moot; and it is further

ORDERED that the cross motion to amend the first amended complaint (Motion Sequence No. 003) is denied; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: December 17, 2009

ENTER:

J.S.C.